5/025/017
5/025/019
5/017/039

April 1, 2000

D. Wayne Hedberg
Permit Supervisor
Minerals Regulatory Program

Re: BLM Forfeitures of Southwest Stone's mining claims; UMC 228622, UMC 355560 & UMC 358104

Dear Mr. Hedberg:

Thank you for your efforts at helping us in our current prediciment. Enclosed please find verification that our claims have indeed been declared "forfeited by law", a decision upheld by BLM after our initial appeal to them.

As you may know , the GSENM is being challenged in court by MSLF and the Utah League of Counties. In addition, Mr. Dettamanti and myself are filing a case in the U.S. Court of Federal Claims, where we hope to eventually get justice.

We understand our responsibilities in regard to reclamation of our mining claims. We also know you are doing everything possible to help us stay financially solvent in the interim. We appreciate your efforts.

If you need further information from us please write to me at Don Wood 421 N. 250 E. Kanab, Utah 84741 or phone at (435) 644-2885. Southwest Stone does no longer have a phone number or address. Mike is getting a new number and address , I will forward them to you when I get them. Thank You.

Sincerely,

Don C. Wood

5/022/011
5/025/019
5/017/039

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IN REPLY REFER TO:

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DIVISION OF
OIL, GAS AND MINING

DEC 28 1998

IBLA 99-49 : UMC 228622 et al.
:
RICHARD A. DETTAMANTI ET AL. : Mining Claim Maintenance Fee
:
: Decisions Affirmed;
: Petitions for Stay Denied as Moot

ORDER

On October 1, 1998, the Utah State Office, Bureau of Land Management (BLM), issued separate decisions declaring three mining claims abandoned and void because no $100 per claim maintenance fee or waiver certification was filed for the claims on or before August 31, 1998, as required by section 10101 of the Omnibus Budget Reconciliation Act of August 10, 1993 (the Maintenance Fee Act), 30 U.S.C. § 28f(a) (1994), and 43 C.F.R. §§ 3833.1-5, 3833.1-6, and 3833.1-7. The required fees were not received until September 23, 1998, and were contained in an envelope bearing a September 21 postmark. Maintenance fees received after August 31 are not timely under 43 C.F.R. § 3833.0-5(m) unless they are received by BLM within the next 15 days and are contained in an envelope postmarked by August 31.

The fees were submitted by Southwest Stone, a partnership of Don C. Wood and Michael R. Dettamanti, which operates the claims for a sculpture supply business. Michael Dettamanti's father, Richard A. Dettamanti, owns the Gyp-One mining claim (UMC 228622); Michael Dettamanti owns the Low Down 1 mining claim (UMC 355560); and Wood owns the Long Gulch 2 mining claim (UMC 358104). Notices of appeal and petitions for stay of BLM's decisions have been filed for the three claims.

Under 30 U.S.C. § 28f(a) (1994), the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a claim maintenance fee of $100 per claim on or before August 31 of each year for the years 1994 through 1998. Under 30 U.S.C. § 28i (1994), failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law." The statute gives the Secretary discretion to waive the fee for a small miner who holds not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands and has performed assessment work required under the Mining Law of 1872. 30 U.S.C. § 28f(d)(1) (1994). BLM has implemented this statute with a regulation that requires a claimant to file "proof of the * * * conditions for exemption * * * with the proper BLM office by the August 31 immediately preceding the assessment year for which the waiver is sought." 43 C.F.R. § 3833.1-6(d)(2).

Under 43 C.F.R. § 4.21(b)(1), a petition for stay must show sufficient justification based on the relative harm to the parties if a stay is

granted or denied; the likelihood of success on the merits of the appeal; the likelihood of immediate and irreparable harm if the stay is not granted; and whether the public interest favors granting the stay. An appellant requesting the stay has the burden of proof to demonstrate that the stay should be granted. 43 C.F.R. § 4.21(b)(2).

Appellants state that the claims provide unique sources of alabaster in different colors, and that the loss of the claims will put them out of business because they are not aware of other sources of supply. Appellants state that they cannot simply relocate the claims because they are in the Grand Staircase Escalante National Monument, which was established by Proclamation No. 6920 of the President on September 18, 1996, for the purpose of protecting the archaeological, paleontological, geological, biological, and other natural and historical values of 1.7 million acres of Federal land. 61 Fed. Reg. 50223 (Sept. 24, 1996). Appellants assert that they will be under an obligation to continue paying for one of the claims, even if it is no longer valid, and that Southwest Stone provides the livelihood for them and their families. Appellants assert that they know of no public opposition to the operation of their 1-acre quarries, and that they have an excellent record of compliance with applicable regulations and will continue to operate in a responsible manner.

Because consideration of the stay request necessarily requires review of appellant's likelihood of success on the merits of the appeal and since appellant has raised issues involved in many similar appeals, we have resolved this appeal in an expedited decision on the merits.

In their statement of reasons, appellants assert that BLM failed to inform them "of the change in land status regarding these claims, or the unique jeopardy due to the change of land status." However, the Monument was established under section 2 of the Antiquities Act of 1906, 16 U.S.C. § 431 (1994), which authorizes the President to declare national monuments "by public proclamation." E.g., Cappaert v. United States, 426 U.S. 128, 131 (1976); Cameron v. United States, 252 U.S. 450, 455 (1920); State of Wyoming v. Franke, 58 F. Supp. 890, 895 (D. Wyo. 1945). Presidential proclamations are required to be published in the Federal Register, 44 U.S.C. § 1505(a)(1) (1994), and filing a document with the Office of the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it" except in cases where notice by publication is insufficient in law. 44 U.S.C. § 1507 (1994). The Antiquities Act contains no provision requiring that individuals having claims within the boundaries of a monument be personally notified before the proclamation can become effective. ?

Appellants question whether the lands in the Monument qualify as Federal lands under 43 C.F.R. Part 3833 and suggest that the claims may not be subject to those regulations "but to the mining law of 1872." Nevertheless, the maintenance fee requirements apply to "[t]he holder of each unpatented mining claim, mill or tunnel site located pursuant to the

Mining Laws of the United States." 30 U.S.C. § 28f(a) (1994). The statute contains no exception for unpatented claims on withdrawn land.

Appellants contend that if they have lost the rights to hold these claims, they have lost "valid existing rights" protected and preserved by the proclamation establishing the Monument, and that the forfeiture of their claims "would also constitute a Taking of rights preserved at that time." We recognize that the monument was established "subject to valid existing rights." 61 Fed. Reg. at 50225. Nevertheless, the forfeiture of a mining claim because the claimant failed to pay the maintenance fees or timely file a waiver certificate does not constitute a "taking" of that claim. In sustaining the validity of the similar forfeiture provision of 43 U.S.C. § 1744(c) (1994), the Supreme Court stated that it was the claimants' "failure to file on time--not the action of Congress--that caused the property right to be extinguished." United States v. Locke, 471 U.S. 84, 107 (1985). The fact that a withdrawal may preclude relocation of the forfeited claims does not change the result. In Locke, supra at 90-91, the Court noted that the mineral for which the plaintiff's claims were located was no longer subject to location, but nevertheless sustained the statutory forfeiture provision.

In a case sustaining the abandonment of mining claims for which the claimant did not pay the rental fees required by the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Rental Fee Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), the court acknowledged that unpatented mining claims are a "unique form of property," but found that "claimholders take their claims with the knowledge that the Government, as owner of the underlying fee title, maintains broad regulatory powers over the use of the public lands on which unpatented mining claims are located." Kunkes v. United States, 78 F.3d 1549, 1553 (Fed. Cir.), cert. denied, 117 S.Ct. 74 (1996), citing United States v. Locke, supra. We have adhered to the ruling in Kunkes in cases involving maintenance fees. E.g., Harlow Corp., 135 IBLA 382, 385-87 (1996).

Appellants further contend that the loss of their claims would be in violation of other Federal law, including the Small Business Regulatory Enforcement Fairness Act, Title II, Pub. L. No. 104-121, 110 Stat. 857-874 (1996), and the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994). Appellants cite no particular provision of either statute that would provide a basis for reversing BLM, and we find nothing in either statute that would modify the maintenance fee requirement or the penalty of forfeiture that Congress itself imposed when it enacted the Maintenance Fee Act. We note that when the Department promulgated final regulations implementing the Maintenance Fee Act, it certified that the rules would not have a substantial economic effect on small entities under the Regulatory Flexibility Act. 59 Fed. Reg. 44855 (August 30, 1994).

Appellants further state that access to two of the claims has been denied during August and September because of a prolonged road closure, and they question how BLM can collect maintenance fees when access is denied.

Under 43 C.F.R. § 3833.1-6(d)(1), a mining claimant may obtain a waiver of maintenance fees if he has received a declaration of taking or a notice of intent to take from the National Park Service, or "has otherwise been denied access by the United States to his/her mining claims or sites." In order to qualify for a waiver of fees for this reason for the 1998-99 assessment year, appellants were required to "file proof of the conditions for exemption, attested to as a certified statement," by August 31, 1998. 43 C.F.R. § 3833.1-6(d)(2). No such filing was made.

Moreover, closure of a road would not ordinarily constitute a "denial of access" within the meaning of this regulation. In a case involving a similar regulation under the Rental Fee Act, Richard C. Swainbank, 141 IBLA 37 (1997), we concluded that BLM properly requires claimants who apply for the exemption to demonstrate that they have actually sought access to their claims and that such access has formally been denied. In Ahtna, Inc., 139 IBLA 89, 94 (1997), we concluded that the mining claimant had not been denied access within the meaning of the regulation because the surface management agency had specifically authorized access to the claims by fixed-wing aircraft to conduct surveys on foot to locate existing claim corners and discovery points.

We sympathize with appellants in the loss of their claims, but even where extenuating circumstances are asserted, BLM and this Board are without authority to excuse lack of compliance with the maintenance fee requirement of the Act, to extend the time for compliance, or to afford any relief from the statutory consequences. In the absence of the maintenance fee or exemption, BLM properly declared the claims forfeited. Harlow Corp., supra at 385; Alamo Ranch Co., 135 IBLA 61 (1996).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and the petition for stay is denied as moot.

James L. Byrnes
Chief Administrative Judge

I concur:

James F. Roberts
Acting Administrative Judge

APPEARANCES:

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cc: Office of the Field Solicitor
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